SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1049

MERKLE C. ALTOM
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT:

The Petitioner, Merkle C. Altom, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above case.

OPINION BELOW

The United States Court of Appeals for the Seventh Circuit decided this case on December 23, 1971 and the

printed opinion has not been published. The Court's order deciding this case is set forth in Appendix A hereto. A Petition for Rehearing was timely filed and the same denied on January 17, 1972.

JURISDICTION

The decision and judgment of the United States Court of Appeals for the Seventh Circuit was entered on December 23, 1971. A Petition for Rehearing was timely filed within the allowed time by the Rules of the said lower court and same was denied on January 17, 1972.

The statutory provision believed to confer upon this Court, jurisdiction to review the judgment in question by Writ of Certiorari in Title 28, United States Code, Section 1254 (1).

ISSUES PRESENTED FOR REVIEW

1. Whether the search resulting in the seizure of the Wavetek Generator specified in Court IV of the indictment was unreasonable because it exceeded and went far beyond the scope and limits of the consent given by the defendant.

2. Whether the government failed to sustain the burden of proving the charges in Counts I, II and III of the indictment and did not meet the evidentiary requirements of the crime charged against the defendant.

3. Whether the government failed to sustain the burden of proving the necessary elements of the crime charged in Count IV of the indictment.

STATEMENT OF THE CASE

On February 4, 1970, four agents of the Federal Bureau of Investigation went to the defendant's home for the purpose of conducting a search for certain listed items of equipment. The defendant signed a consent to search

form after these specific items of government property alleged to be stolen were listed on the back of that form which is Government's Exhibit No. 2. The agents then proceeded to the basement shop of the defendant's home and began their search. They made a list of all equipment they found in the basement workshop and seized three generators which are Government's Exhibit Numbers 3, 4 and 5.

On February 9, 1970, after these agents had turned the list they had compiled of the equipment they found in the defendant's basement workshop over to the officials at Naval Avionics Facility and had learned that one of the items listed was thought to be United States Government Property, they filed with the United States Commissioner, Robert W. Geddes, a complaint for issuance of a search warrant.

After the search warrant was issued, the same agents of the Federal Bureau of Investigation went to the defendant's home, informed him of an outstanding warrant for his arrest and notified him of the charges against him. They arrested the defendant, then showed to him the search warrant and gave him a copy thereof. Then they proceeded directly to the basement and confiscated the Wavetek Generator which is Government's Exhibit Number 6, described in Count IV of the indictment, which they had discovered during the search a week earlier.

The indictment was filed against the defendant on April 3, 1970. Therein, the defendant was charged in Counts I, II and III with receiving, concealing, and retaining with the intent to convert to his own use and gain three stolen electronic Generators each of a value over $100.00 which were the property of the United States Government and had received them knowing them to have been stolen. Count IV charged that the defendant did willfully and knowingly steal, purloin and conver to his own use one electronic generator being the property of the United States Government valued at over $100.00. All of the charges were

stated to be in violation of Title 18, United States Code, Section 641.

On September 2, 1970 the defendant filed his Waiver of Jury Trial and the government likewise filed a Waiver of Jury Trial. On September 3, 1970, the Waiver of Jury Trial was approved by the Court.

After trial of this cause the Court found the defendant guilty as charged in each Count of the indictment on October 15, 1970, and a pre-sentencing investigation was ordered and sentencing was set.

On November 27, 1970, the sentencing was held before the Court and the defendant was sentenced to two years on each of the four counts of the indictment, the sentences to run concurrently. The sentence was suspended and the defendant was placed on probation for two years and fined $1,500.00 plus costs.

The defendant appealed the judgment of the trial court to the United States Court of Appeals for the Seventh Circuit which appeals court denied the defendant and ruled on December 23, 1971. A Petition for Rehearing was filed and overruled on January 17, 1972.

The defendant, Merkle C. Altom, is married with a family and lives in his own home in Indianapolis, Indiana. He had been a government employee for several years and had worked at Naval Avionics Facility for approximately four years, before that he had been employed by the United States Post Office Department for eight and one-half years. He had been a good employee and had never been charged or convicted of any crimes. Over the years, he had developed a strong friendship with another Naval Avionics Facility employee, one Ellsworth Smith. This friendship had begun in 1961 while the defendant was taking evening classes in radio at Arsenal Technical High School, and had continued through their employment together at Naval Avionic Facility.

Ellsworth Smith, through his close friendship and because of certain work the two men had done together, had been given a key to the defendant's home. He had used this key on several occasions while the defendant was away from home and when he desired to work in the basement shop. Mr. Smith was a television and electronics expert and had taught evening classes in those areas, after his regular working hours at Naval Avionics Facility, at both university level and at several high schools in the area. As his field was electronics and his position at Naval Avionics Facility was in the Training Division wherein he taught the use of equipment such as that specified in the indictment, he was able to utilize highly complex electronic equipment such as that specified in the indictment.

Initially, suspicion was directed at the defendant only after the theft of two (2) survival radios from Naval Avionics Facility during the month of January 1970, and after the defendant's foreman had accused him of taking them to the Government Agents investigating the theft.

In fact, the officials at Naval Avionics Facility stated that they had begun first to suspect Ellsworth Smith of removing from the facility some government property and he was being watched. Thus, because of his close association with Mr. Smith, the defendant also came under suspicion as it was thought that he might be carrying out some property from the closely guarded facility for Ellsworth Smith. But, even though officials suspected the defendant and watched him closely over long periods of time and inspected his packages and lunch bucket, he was never found to be carrying any government property.

The defendant never took out any of the generators specified in the complaint with a property pass and because of their bulk, it was shown that he couldn't possibly have taken them out without such a pass.

In January of 1970, Government Exhibits 3, 4 and 5 being the subject of Counts I, II and III of the indictment, were found to be missing from the cabinet or con-

sole in which they were positioned. This console was kept in a smaller building attached to the main building at Naval Avionics Facility. However, this building was open and was never locked and access to it could be had by all electricians and employees.

In connection with the suspected theft of a spray gun and two survival radios, agents of the Federal Bureau of Investigation first interviewed the defendant on February 3, 1970, at his place of employment. The next day, February 4, 1970, four agents of the Federal Bureau of Investigation appeared at the defendant's home and asked him to allow them to search for certain items of stolen equipment which they had written on a list. They showed this itemized list to the defendant and assured him that this was all they were looking for. They offered the defendant a Consent to Search Form to be signed, but the defendant objected to the general wording and phraseology of that form, whereupon the agents enumerated specifically on the back of that form the specific items for which they would be searching. After this itemized list was written on the back of the form, the defendant signed the Consent to Search Form, being Government's Exhibit Number 2. The agents then went to the defendant's basement workshop and began a search which lasted for over four hours. During that time they recorded type, serial number and specific descriptions of several items of equipment located in the shop, a list that included some 39 items. Some of these items that were inventoried by the agents were items that were marked or stamped with a "U Anchor S" marking which it was shown, was equipment such as could have been purchased in any Army Surplus Store.

During their search the agents found and seized three generators which were Government's Exhibit Number 3, 4, and 5, the subject of Counts I, II and III of the indictment.

The government agents then took the inventory they had compiled of the equipment in the defendant's work-

shop to the officials of Naval Avionics Facility. The officials checked out the list and learned that some of this equipment was stolen from the government. The agents then secured a search warrant and one week after their initial search, returned to the defendant's home.

Upon their return to the defendant's home, the agents arrested him on an outstanding arrest warrant, showed him the search warrant and gave him a copy. Then they went directly to the basement workshop and pulled out the Wavetek Generator described in Count IV of the indictment.

During the searches and seizures of the electronic generators, the agents did not attempt to dust for fingerprints because it was their first thought that their finding of the items in the defendant's home would warrant their assumption that he was guilty of stealing them.

During the time, the defendant had explained the presence of the stolen equipment as being stored there by Ellsworth Smith and the agents were of the opinion that the defendant was not guilty of any crime.

The agents had questioned Ellsworth Smith concerning the thefts of government property, and even searched his home.

There was evidence that, while employed at Naval Avionics Facility, Ellsworth Smith loaded two "hand carts" of parts to be taken from the facility without a pass and which included boxes of electronic parts.

It was also shown that the defendant did not know of the presence of the electronic generators and did not have the ability or knowledge or purpose for using them. That, even though it was possible to use the generators for general television servicing, the defendant had not done so.

REASONS FOR GRANTING THE WRIT

I. The petitioner challenges the reasonableness of the search which ultimately resulted in the seizure of the Wavetek Generator which Count IV of the indictment alleges to be stolen by Altom from the Naval facility. The defendant is not arguing that his consent to search was invalid, but rather, he contends that the consent was a limited one and that the Federal Bureau of Investigation Agents abused that consent by conducting a search far exceeding the agreed limits of the search. The fruits of a search conducted in violation of the defendant's rights is not made lawful by the evidence that the search brings to light. *Bumpers v. North Carolina* 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 and further the scope of the particular search must be strictly adhered to by justifing the circumstances by which its initiation was rendered possible. *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685. The FBI agents after gaining entrance to petitioner's home and obtaining a limited search warrant proceeded to inventory all items in the defendant's basement workshop in violation of said limited search agreement. The decision of the appeals court seems to support the petitioner's argument in this matter.

> "Although the agents testimony at the trial is not free from ambiguity on this point, it does seem to support the defendant's view."

During the search the FBI agents discovered the Wavetek Generator specified in Count IV of the indictment and the following day the FBI agents obtained a search warrant and an arrest warrant against the petitioner for theft of the said Wavetek Generator. After arresting the defendant the agents went directly to the basement of petitioner's home and seized the Wavetek Generator. The FBI Agents once they had secured admission into the defendant's home for the limited purpose of searching for certain specific items, then conducted a general search for the purpose of learning all that was present and categorically listing

the items served to deprive the defendant of the protection of his Fourth Amendment Rights. *U.S. States v. Jeffers*, 72, S. Ct. 93, 342 U.S. 48, 96 L. Ed. 59. It has been held that a search to which one consents to meet Fourth Amendment requirements, the search must not exceed the scope of the consent to search requested by the agents and permitted by the defendant. *Katz v. U.S.* 88 S. Ct. 507. In this case the agents in fact did exceed, knowingly and purposely, stating reasons for being there and thereby rendering the results of the search inadmissable. *Simmons v. United States*, 88 S. Ct. 967, 390 U.S. 19 L. Ed. 2d 1247 (1968). It has not been proven in this case that the consent to search given by the petitioner was in fact adequate to allow the search that was conducted and that the consent was freely and voluntarily given for a general search as conducted by the FBI agents. This burden cannot be discharged by mere argument or showing of claimed acquiescence to a claim of lawful authority. *Bumpers v. North Carolina*, 88 S. Ct. 1788, 391 U.S. 543, 20 L. Ed. 799 (1968). It has been further held that when entry is gained through misrepresentation, deceit and subrefuge, the results of the search should not be allowed into evidence. *U.S v. Hurst*, 298 F. Supp. 714 D.C. territory 1969. This case involves the question somewhat similar to that in *Terry v. Ohio*, 88 S. Ct. 1868, 392 U.S. 1, 20 L. Ed. 2d 89. While the facts differ, the warning of the court is applicable. The Court stated that a search which is reasonable at its beginning may violate the defendant's Fourth Amendment Rights by virtue of its ultimate and intolerable intensity in scope. A determination that the scope of any search must in the end, be strictly tied to and justified by the circumstances which renders its initiation permissable.

II. The Government did not meet the evidentiary requirements of the crime charged in Count I, II and III of the indictment against the petitioner. The indictment against the defendant contained four counts. Count I, II, and III charged the defendant with receiving three Telemet

Generators knowing them to have been stolen and Count IV charged the defendant with stealing a Wavetek Generator. After a search of the petitioner's home all four items were found in one box in the petitioner's basement and the three Telemet Generators were removed from the petitioner's home after the initial search and Wavetek Generator was removed the next day at the time of the petitioner's arrest. At the trial of this cause the Government did not attempt to show that the petitioner was guilty as a receiver but tried to show that the petitioner was actually the one that committed the theft of all four generators specified in Count I through IV of the indictment. The elements of the offense of receiving stolen property has been specified as (1) receipt of stolen property, (2) with knowledge that they have been stolen, and (3) with content to convert to the possessor's own use. *Teal v. United States,* 407 Fed. 2d 604 (C.A./mo 1969). In the prosecution for knowingly receiving, concealing and retaining, with intent to convert the same to their own use and gain, stolen government property, the government has the burden of proving guilt beyond a reasonable doubt. *Gargotta v. United States,* 77 Fed. 2d 977 (C.A./mo 1935). This, the government failed to do. Specifically there was no evidence from whom or when the property was received. The government relied upon the theory that the evidence would show that the defendant was guilty of all of the four generators and would not have to prove that the petitioner had knowledge that the three Telemet Generators had been stolen. The requirement of proof that receiving stolen property from someone from whom the petitioner knew the goods to have been stolen, was not met during this trial. It has been held that where the government's proof establishes that the accused himself, and not some other person, stole the property as specified in the indictment, it failed to establish the offense of receiving and concealing such property of the United States with intent to convert the same to his own use and gain. *Cartwright v. United States,* 146 Fed. 2d 133, C.C. 8th Texas 1944.

A defendant cannot be punished for stealing government property and for receiving, concealing or retaining that same property. *U.S. v. Minchew*, 417 Fed. 2d 218, CCALA 1969, Certiorari denied 90 Supreme Court 1246, 397 U.S. 1014.

It would then appear that the defendant was found not guilty of *receiving* the stolen property, for it was never shown that anyone stole it and transferred it to the petitioner. At best, the proof offered by the government when to the guilt of the petitioner for actually stealing, yet this did not meet the evidentiary requirements of the crime alleged.

III. In this case the Government failed to sustain the burden of proving the necessary element of the crime charged in Count IV of the indictment relating to the theft of the Wavetek Generator.

The Government did not have eye witnesses who could state that the defendant took any property from the Naval Facility and aside from the presence of the generator in the defendant's basement which was amply explained by the defendant at the trial, there was no substantive evidence to show a criminal connection.

Evidence to be substantial must do more than merely raise suspicion. There must be more established than mere suspicion of guilt. *Lewis v. United States*, 422 Fed. 2d 1089 § Oklahoma 1970. The circumstantial evidence at the trial considered for the most part the testimony of the defendant's employment at Naval Avionics Facility and his position there as an electronics man which by its nature required that he have access to most areas of the building. Yet, it has been said that circumstantial evidence must not only be consistent with guilt, it must also be inconsistent with every reasonable hypothesis of innocence. *O'Brien v. United States*, 411 Fed. 2d 522, CCA Alabama 1969.

The government relied on the doctrine of "that unexplained possession of recently stolen property by a

defendant can raise an inference of theft." In the present case the property was not recently stolen shown by the testimony at the trial, (fifteen months). Further the petitioner argues that even applying the doctrine to this case the petitioner's rights were violated in that during the trial the Court admitted testimony regarding the presence of other equipment in petitioner's workshop seeking to raise an inference that all of this other equipment in the defendant's basement workshop had been stolen by the defendant from the Naval facility. The Government continued to elicit this testimony over the objections of the defendant's trial counsel who warned the Court that permission to conduct such an inquiry would be either prejudicial to the defendant's case and serve to deny him his Federal Constitution Guarantees. The Court permitted this testimony to continue, though on the condition that the Government link up the testimony with the evidence that the shop evidence had in fact been Government property stolen by the defendant. That condition was never required.

This introduction of the results of the search, intimating that other items found were stolen, was highly prejudicial as the probative value of the results were minor compared with the prejudicial effect. *United States ex rel Durso v. Pate*, 426 Fed. 2d 83 ECA, 111, 1970. The testimony of the mere presence in defendant's basement workshop certain items of equipment that could have been purchased from the surplus market is insufficient to raise the presumption that the defendant stole it from the Government. The same would apply to the testimony concerning the presence of the Wavetek Generator in the defendant's basement.

CONCLUSION

For the reasons given it is respectfully submitted that the decision of the United States Court of Appeals for the Seventh Circuit should be reversed upon a granting of certiorari herein and the said relief is hereby prayed for.

DEAN E. RICHARDS

Attorney for Petitioner

APPENDIX

In the United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1971 — SEPTEMBER SESSION, 1971

No. 71-1134

MERKLE C. ALTOM,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. IP 70-CR-132

S. HUGH DILLIN,
Judge

December 23, 1971

Before DUFFY, *Senior Circuit Judge,* CUMMINGS and PELL, *Circuit Judges.*

PELL, *Circuit Judge.* Appellant Merkle Altom was found guilty in a bench trial of violating 18 U.S.C. §641[1]

[1] 18 U.S.C. §641 (1970) provides:
Public money, property or records.
"Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
"Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—
"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.
"The word 'value' means face, par or market value, or cost price, either wholesale or retail, whichever is greater." (June 25, 1948, ch. 645, 62 Stat. 725.)

and was sentenced to serve two years for each of four counts, the terms to run concurrently. He was also fined $1500 and court costs. The district court then suspended the sentences and placed Altom on probation for two years. From the convictions, Altom has taken this appeal.

The first three counts of the indictment charged that on December 1, 1968, Altom received, concealed and retained with intent to convert to his own use three stolen electronic generators, each having a value over $100; which were the property of the United States Government, and that Altom then knew them to have been stolen. The fourth count charged that Altom, on or about March 26, 1969, wilfully and knowingly did steal, purloin and convert to his own use a fourth generator, also Government property and having a value in excess of $100.

On February 3, 1970, as part of an investigation concerning suspected thefts at the federal Naval Avionics Facility in Indianapolis, agents of the Federal Bureau of Investigation interviewed the defendant, who was employed at the Facility as a duty electrician. They asked him if they could search his house within the next few days and he orally consented.

On the morning of February 4, 1970, the F.B.I. agents acquired a list of items which had been reported stolen from the Naval Avionics Facility. Later that day, four F.B.I. agents came to Altom's home and asked Altom to allow them to look for items missing from the Facility. When Altom inquired whether the agents were only going to be searching for the three items (two survival radios and a paint spray gun) he had been questioned about the day before, the agent in charge of the search (John Aziere) replied that he had a list of other items for which he was going to be looking. Agent Aziere then produced a Consent to Search form to be signed. Altom objected to a phrase authorizing the agents to take from his premises "any letters, papers, materials or other property which they may desire." Aziere then scratched out that language and substituted "see back of this form." On the reverse side, he enumerated certain items, including three pieces of TV test equipment (Telemet

Company generators),[2] which were missing from a console that had been returned to the Naval Avionics Facility by Ellsworth Smith, just before Smith ceased employment at the Facility. Smith was a friend of the defendant and a fellow electronics buff.

The agents searched Altom's basement workshop for several hours, during which time they recorded type, serial numbers, and descriptions of about 40 items. The agents found and seized the three generators that had been listed on the back of the Consent to Search form. Glue and adhesive were observed on the outside of the generators in the shape of calibration control labels, property tags and console part tags. The serial numbers of the generators were missing from their casings.

Altom told the agents that the box containing the generators was one of several boxes placed in his basement by Smith. At trial, the defendant indicated that he did not know from direct observation that Smith had left the box but he assumed that Smith had done so because Smith had a key to Altom's house and allegedly had been going down to the basement workshop without disturbing Altom, to store or check equipment. Smith, however, testified that he had not stored any equipment at the defendant's house. He also said that the only equipment he had lent Altom during their friendship was a radio, a B & K television analyst and a wood jointer.

In the same box containing the three Telemet generators, there was also a fourth generator, a Wavetek. The F.B.I. agents did not seize the Wavetek, but noted its description and replaced it in the box. They did not know at that time that it was stolen property. Later, Naval Avionics Facility officials informed the F.B.I. that the

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[2] The full list of items was: (1) 2 survival radios, Serial Numbers CKJ 212 and CKJ 3084; (2) 1 spray gun and cup, Binks #19, Serial Number 18235282; (3) 3 small 2½" x 2½" audio speakers; (4) Skill [Skil?] drill Model 597, marked D 430; (5) electric hand drill, Serial Number 3042-285-642; (6) telephones; (7) diodes used in battery charger; (8) test equipment for TV, Models 3502, 3512 and 3507, 12" square [the Telemet generators]; (9) Skill [Skil?] hand sander, portable electric, Model 852; (10) microphone, Model 600 E; (11) Deviobiss [sic], Model JGA 502 paint sprayer; (12) or any other item which may have the mark U. anchor S. or NAFI stamped on it.

Wavetek generator was Government property stolen from the Facility.

The Wavetek generator, which is the subject of Count IV of the indictment, was calibrated on March 26, 1969, at the Naval Avionics Facility. A couple of months later, it was found to be missing from the Facility. The last time Ellsworth Smith was inside the Facility was in December 1968, when he had been admitted as a guest. The Facility was guarded and property was supposed to be removed only with a property pass. The defendant had access to about 90 percent of the Facility through the use of the duty electrician keys that he carried. The areas to which Altom had access included the areas from which the generators were taken.

On December 10, 1970, the agents returned to Altom's home, arrested Altom on an outstanding arrest warrant, and, pursuant to a newly-acquired search warrant, seized the Wavetek generator.

On this appeal, Altom strongly challenges the reasonableness of the search that ultimately resulted in the seizure of the Wavetek generator, which Count IV of the indictment alleged had been stolen by Altom from the Facility. The defendant is not arguing that his consent to search was invalid. Rather, he contends that the consent was a limited one and that the F.B.I. agents abused that consent by conducting a search far exceeding the agreed limits. Thus, a legitimate search for specific, listed items became, according to Altom, an unconstitutional "all-out no holds barred search." He argues that the results of the search (the Wavetek generator) should be inadmissible because the search violated his fourth amendment rights. The obtaining of a search warrant for the Wavetek was allegedly merely an attempt to give some semblance of reasonableness to the whole transaction.

We must first consider the effect of the wording of the Consent to Search form that Altom signed on February 4. The front of the form reads in part: "I, Merkle C. Altom, . . . hereby authorize . . . [named Special Agents of the F.B.I.] to conduct a complete search of my premises. . . ." However, as previously noted, upon objection by Altom the form was modified.

The form that Altom signed did not in any way limit the scope of the search; it only limited the items that the agents were authorized to take from Altom's premises. In oral argument, appellant's counsel stated that the understanding between Altom and Aziere was that the agents would confine their search to the items listed. Although the agent's testimony at trial is not free from ambiguity on this point, it does seem to support the defendant's view.

That the form was not meant to apply literally is also supported by the fact that, although the form authorized a "complete search of my premises," the agents confined their search to Altom's basement workshop.

In this appeal, Altom describes at length what the agents did during the several hour search. He points out, for example, that the searchers cataloged the serial numbers and identifying marks of about forty items in Altom's workshop not all of which had been specified in the list developed from information supplied by Facility officials. This cataloging included a description of the Wavetek generator, which was in a box containing the three Telemet generators for which the F.B.I. agents concededly had obtained a valid consent to search.

In its brief, the Government asserts that the seizure of the Wavetek generator was entirely lawful but provides no cases to support its conclusion. We find more significance in the Government's statement that the legality of the seizure was not challenged in the district court. The record before us reveals no pretrial motion to suppress, and defendant's trial counsel made no objection to the admission into evidence of the Wavetek generator described in Count IV of the indictment. The Government argues that a motion to suppress evidence cannot be made for the first time on appeal, citing *United States* v. *Phillips*, 375 F.2d 75, 78 (7th Cir.), *cert. denied*, 389 U.S. 834 (1967), and *Butler* v. *United States*, 153 F.2d 993, 994 (10th Cir. 1946).

We think the Government's point is sound. It is well established that a court of appeals will not normally consider objections to evidence where no objection to

admission was made in the federal district court. *See, e.g., United States* v. *Chastain*, 435 F.2d 686, 687 (7th Cir. 1970).

> "Appellant Davis urges the defense of illegal search and seizure, but . . . Davis . . . [did not see] fit to move to suppress the seized evidence on these grounds at or before the trial. None of the appellants objected to the introduction of the seized materials on the ground that their constitutional rights had been violated. We, therefore, do not consider this point." *United States* v. *Burrell*, 324 F.2d 115, 119 (7th Cir. 1963), *cert. denied*, 376 U.S. 937 (1964).

There may be numerous reasons for counsel not objecting to offered evidence. The defendant on appeal makes no claim that his representation at trial was inadequate. His counsel below presented a vigorous defense. A court of appeals should not substitute its judgment of proper trial tactics for that of the lawyer in the forum. *Wyche* v. *United States*, 193 F.2d 703, 704 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 943-44, *reh. denied*, 343 U.S. 921 (1952).

We are aware, of course, that if "plain error" is committed in a criminal case, an appellate court may notice it and may correct it even though it was not brought to the attention of the trial judge. Fed. R. Crim. P. 52(b). However, "[i]t is settled law that the plain error rule should be applied with caution, and invoked only to avoid a miscarriage of justice." *United States* v. *Robinson*, 419 F.2d 1109, 1111 (8th Cir. 1969). An appellate court's power under Rule 52(b) is "discretionary and may be exercised only to prevent a manifest miscarriage of justice." *United States* v. *Grasso*, 437 F.2d 317, 319 (3d Cir. 1970), *as amended on denial of rehearing* (1971), *cert. denied*, 403 U.S. 920 (1971).

If the defendant had desired to have the question of the inadmissibility of the Wavetek considered, he could have properly raised the issue in the trial court by filing a motion to suppress or by objecting to the introduction of the Wavetek generator in evidence. The record on appeal would then reveal the pertinent facts more fully. At trial, the defendant apparently relied heavily on the theory that he did not know that any of the generators

were in his basement and that his friend, Ellsworth Smith, sometimes stored boxes there, the exact contents of which Altom was ignorant. The defense emphasized Altom's "good character" and Smith's expertise in electronics.

The district judge as the finder of fact did not accept the defendant's theory. "We see no reason why the defendant, after he has pursued the foregoing course, can, after he determines it is unsuccessful, reverse his position and claim that the . . . [evidence was] improperly before the jury. If the jury had accepted defendant's theory, he . . . would not have been convicted." *Gendron* v. *United States,* 295 F.2d 897, 903 (8th Cir. 1961).

We appreciate the defendant's concern on appeal that law enforcement officers might abuse a citizen's consent to a limited search and conduct an unwarranted general search. However, a party must make a strong showing to justify the invocation by a court of appeals of the plain error rule. The record in this case is insufficient to require the application of that rule. It does not clearly support the appellant's contention that the entry of the agents was gained through misrepresentation, deceit and subterfuge. We note, too, that the Wavetek generator was plainly visible in a box with three other generators that had been included in the list on the reverse side of the consent. Apparently the Wavetek, like the three Telemet generators, had glue marks and other residue marks of tags the same size as tags used at the Naval Facility.

Altom also challenges his conviction under Count IV on the ground that the Government failed to sustain its burden of proving the necessary elements of the crime therein charged. The appellant points out that the case against him was based on circumstantial evidence and that the Government had no eyewitnesses who could state that Altom took any property from the Naval Avionics Facility on any date. The presence of the Wavetek generator in his basement only raised a suspicion. Altom argues that circumstantial evidence must not only be consistent with guilt, but it must also be inconsistent with every reasonable hypothesis of innocence.

We cannot agree with the appellant that the Government failed to sustain its burden. As then Circuit Judge Blackmun stated in *Anderson* v. *United States*, 406 F.2d 529, 532 (8th Cir. 1969), "the fact of theft, just as any other fact, may be proved circumstantially." "Intent, of course, usually can only be shown by circumstantial evidence." *Aron* v. *United States*, 382 F.2d 965, 970 (8th Cir. 1967). It is well established that possession of recently stolen goods supports an inference of participation in the theft. *See, e.g., United States* v. *Coppola*, 424 F.2d 991 (2d Cir.), *cert. denied*, 399 U.S. 928 (1970); *United States* v. *De Sisto*, 329 F.2d 929, 935 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964).

On this appeal, we must view the evidence in its aspect most favorable to the Government. The Government established that the defendant had possession of the recently stolen, tagless Wavetek in his basement in a box with three other stolen generators, that the generator was stolen from the plant where the defendant worked, that the defendant had access to the area from which the Wavetek had been stolen and that the defendant had an interest in the field of electronics.

The defendant emphasizes that other employees also had access to the area in question. The Wavetek generator, however, was found in Altom's basement, not in the house of one of the other employees. Ellsworth Smith, whom defendant's trial counsel hinted was the real thief, was last inside the Facility in December 1968. The Wavetek generator was removed some time between the end of May 1969 and June 1969.

The defendant is correct that the inference of theft to be drawn from possession of recently stolen property must be made in light of all the circumstances of a case. However, the district court found that no reasonable explanation consistent with innocence existed, stating:

> "[T]he case . . . boils down to a question of who are you going to believe. Mr. Smith has been referred to throughout the testimony. . . . [A]fter hearing the evidence and after paying particular attention to the testimony of Mr. Smith and Mr. Altom, observing

> their demeanor on the witness stand, considering the evidence relating to this question which has figured so much in the testimony, I am convinced beyond a reasonable doubt that the defendant is guilty as charged. . . . [I]t just shakes down to a matter of credibility, corroboration."

It has not been demonstrated to us that the district court's credibility determination should not be accepted on this appeal.

The appellant advances a similar lack of evidence argument in regard to his convictions under Counts I, II and III (the "receiving, concealing or retaining" counts). Much of our discussion above is applicable here. Possession of stolen property even 15 months after the theft was discovered can give rise to the inference that the possessor knew that the property had been stolen. *United States* v. *Riso*, 405 F.2d 134, 138 (7th Cir. 1968), *reh. denied* (1969), *cert. denied*, 394 U.S. 959 (1969); *United States* v. *Allegrucci*, 299 F.2d 811, 815 n. 4 (3d Cir. 1962). *See also United States* v. *Hood*, 422 F.2d 737, 741-42 (7th Cir.), *cert. denied*, 400 U.S. 820 (1970). "Whether possession is sufficiently 'recent' to justify an inference of guilt is a question of fact solely for the jury. . . . The facts and circumstances of each case must determine whether the doctrine of possession . . . is to be applied." *Lee* v. *United States*, 363 F.2d 469, 475 (8th Cir.), *cert. denied*, 385 U.S. 947 (1966). The inference used to prove the first three counts is legitimate. We will not disturb the determination by the finder of fact that the inference arising from the possession of stolen property was not overcome.

Altom apparently further contends that the Government was required to show from whom the property was received, and that it failed to do so. He interprets the Government's case as an attempt to prove that he himself stole the property that he was charged in the first three counts with receiving. He then argues that where the prosecution establishes that the accused, and not some other person, stole the property specified in an indictment charging receiving, the prosecution has failed to prove the offense of receiving and concealing the property.

The appellant is correct that a person cannot be convicted and punished for both stealing Government property and for receiving or concealing and retaining the same property. *Milanovich* v. *United States*, 365 U.S. 551 (1961). Altom does not, however, come within this proscribed category. The stealing count (Count IV) relates to a different item of property than the receiving counts do.

Altom gives us no authority for the proposition that the Government must show who actually stole the property that a defendant is charged with receiving. The Government in this case did prove by circumstantial evidence that the three Telemet generators were taken from the Facility. We agree with the Fifth Circuit in *United States* v. *Minchew*, 417 F.2d 218, 220 (5th Cir. 1969), *cert. denied*, 397 U.S. 1014 (1970), in which it stated: "[It is unnecessary that] the trial court [instruct] the jury that they could convict defendant of retaining Government property only if they first found that he had not stolen that property. Defendant advances no line of logic, and we can think of none, that compels or persuades us to expand *Milanovich* to the limits he suggests." Where evidence is presented that a defendant actually stole the goods that he is charged with receiving, and the indictment includes both offenses, courts have held that the proper resolution of this inconsistency is for the trial court to instruct the jury in the alternative, that is, to convict of one offense or the other, but not both. *Milanovich*, *supra*; *Fuller* v. *United States*, 407 F.2d 1199, 1223 (D. C. Cir. 1967), *on reh. en banc* (1968), *cert. denied*, 393 U.S. 1120 (1969).

The defendant cites *Cartwright* v. *United States*, 146 F.2d 133 (5th Cir. 1944), and that case does contain some language that would seem to support his argument.[3] We

[3] "The government misapprehends appellant's second point against the conviction on the second count [concealing Government property knowing it to have been stolen]. It devotes its discussion on that point to defending the indictment as sufficient though it fails to allege that the property had been stolen by some person other than the defendant. The strength of appellant's attack and the weakness of the government's defense does not lie in the fault in the indictment. It lies in the proof, which, establishing that not some other person but appellant himself stole the property, failed to establish the commission of the offense denounced by the statute." *Cartwright* v. *United States*, 146 F.2d 133, 135 (5th Cir. 1944).

believe though that that language must be read in the context of the offenses involved in that case. The defendant in *Cartwright* was convicted of both stealing certain enumerated articles of Government property and of concealing the same. We emphasize that in the instant case the Government did not charge Altom with both stealing and concealing the Telemet generators. What complicates Altom's case is that the kind of evidence adduced by the Government to prove the receiving counts is also the basis for a permissible inference of guilt of theft. However, in its case under Counts I, II and III, the Government was relying on only the first inference permitted to be drawn from the fact of possession, namely, that the possessor knew the property to have been stolen.

The final point the appellant raises is that the trial court erred in allowing the Government to present testimony about pieces of shop equipment in Altom's basement that were not included in the indictment. Altom claims that the Government was trying to imply that all of this equipment had been stolen by him from the Facility and that the introduction of these results of the search had a great prejudicial effect.

We cannot agree that the trial court's admission of testimony about other items found during the search created such a prejudicial effect as to require reversal or a new trial. The agent's testimony was acceptable as providing proper background. Moreover Number 12 on the reverse side of the Consent to Search form that Altom signed reads "OR any other item which may have the mark . . . [U. anchor S.] or NAFI stamped on it." Because of defense counsel's objections to testimony about the equipment in Altom's workshop, only a few items were specifically mentioned at trial, and of these few items, at least one had a "U. anchor S." on it.

Also, although this was a criminal rather than a civil case, we cannot be unmindful that this was not a jury case. "The admissibility of evidence . . . shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience." Rule 26, Fed. R. Crim. P.

Generally, it is held that a broad rule of admissibility is favored in the federal courts. It is designed to permit the admission of all evidence which is relevant and material to the issues in controversy, unless there is a sound and practical reason for excluding it. *United States* v. *Sowards*, 370 F.2d 87, 90 (10th Cir. 1966). We note, too, that appellate courts have held that in criminal cases, the trial judge has wide discretion in ruling upon the admissibility of evidence. *E.g., Hale* v. *United States*, 406 F.2d 476, 480 (10th Cir.), *cert. denied*, 395 U.S. 977 (1969).

Further, the federal courts have recognized in the case of bench trials a presumption that the trial court considered only the competent evidence and disregarded all evidence that was incompetent. *Thompson* v. *Baltimore & O. R.R.*, 155 F.2d 767, 771 (8th Cir.), *cert. denied*, 329 U.S. 762-63 (1946); *United States* v. *6.87 Acres*, 147 F.2d 351, 353 (2d Cir. 1945). *See also* C. McCormick, *Handbook of the Law of Evidence* §60, at 137 (1954). Here there was competent evidence to support the conviction, and we find no prejudice to the defendant.

In accordance with the foregoing discussion, we affirm the defendant's convictions on Counts I, II, III and IV.

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS 60604

JANUARY 17, 1972

BEFORE

HON. F. RYAN DUFFY, SR., Circuit Judge

HON. WALTER J. CUMMINGS, Circuit Judge

HON. WILBUR F. PELL, JR., Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MERKLE C. ALTOM,

Defendant-Appellant.

No. 71-1134

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

IT IS ORDERED by the Court that the petition for rehearing filed in the above-entitled cause be and the same is hereby denied.

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MICHAEL RODAK, JR., CLERK

No. 71-1049

In the Supreme Court of the United States

OCTOBER TERM, 1971

MERKLE C. ALTOM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

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MERKLE C. ALTOM, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a trial before the court in the United States District Court for the Southern District of Indiana, petitioner was convicted on one count of having stolen property of the United States and on three counts of having received, concealed and retained, with intent to convert to his own use, property of the United States, with knowledge that it had been stolen, in violation of 18 U.S.C. 641. He was sentenced to concurrent suspended prison terms of two years and

placed on probation for two years, and was also fined $1,500. The court of appeals affirmed (Pet. 1a-12a).

Petitioner's contentions—that the evidence was insufficient on all counts and that a search which produced the property which was the subject of one count exceeded the scope of the consent given—are fully answered in the opinion below.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1972.

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